84-1805

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No. 84-.....

In The

Supreme Court of the United States

October Term, 1984

THE TULALIP TRIBES OF WASHINGTON,
UPPER SKAGIT INDIAN TRIBE,
SWINOMISH TRIBAL COMMUNITY,
SAUK-SUIATTLE INDIAN TRIBE,
SKAGIT SYSTEM COOPERATIVE,
POINT NO POINT TREATY COUNCIL,
NATIONAL WILDLIFE FEDERATION,
IDAHO WILDLIFE FEDERATION,
MONTANA WILDLIFE FEDERATION,
FRIENDS OF THE RIVER, and
TROUT UNLIMITED, INC.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Are federal agencies and commissions immune from attorney fee awards under the Equal Access to Justice Act, 28 USC § 2412, whenever a statute precludes the award of "costs" against them?

PARTIES

The parties to this proceeding are listed in the caption. The National Wildlife Federation is a non-profit corporation organized as described in section 501(c)(3) of the Internal Revenue Code of 1954, 26 USC 501(c)(3). The National Wildlife Federation has an affiliate organization in each state. Every affiliate is named using the state in which it is located, followed by the words "Wildlife Federation", with the exception of the: California Natural Resources Federation; Conservation Council for Hawaii; League of Kentucky Sportsmen; Natural Resources Council of Maine; Michigan United Conservation Club; Minnesota Conservation Federation; Conservation Federation of Missouri; New Jersey State Federation of Sportsmen Club; New York State Conservation Council; League of Ohio Sportsmen; Pennsylvania Federation of Sportsmen; Natural History Society of Puerto Rico; Environmental Council of Rhode Island; Tennessee Conservation League; Sportsmen Club of Texas; Vermont Natural Resource Council; Virgin Island Conservation Society; Washington State Sportsmen Council.

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The opinion of the Ninth Circuit Court of Appeals that the Federal Energy Regulatory Commission ("FERC" or "Commission") is immune from attorney fee awards under the Equal Access to Justice Act because the Federal Power Act, 16 U.S.C. §825p, precludes an award of costs is reported at 749 F. 2d 1367 (9th Cir. 1984). The opinion of the Ninth Circuit Court of Appeals on the merits of Petitioners' successful challenge to certain regulations of the Federal Energy Regulatory Commission is reported at 732 F. 2d 1451 (9th Cir. 1984). Both opinions are included in Appendix A. The Ninth Circuit appeal arose out of FERC's Order 255-A (issued December 29, 1982), 21 FERC ¶61,369, which denied Petitioners' rehearing request regarding the regulations in dispute. Those regulations are commonly referred to as the "natural water feature rule", and were adopted in FERC Order 255, 47 Fed. Reg. 38, 506 (1982) (codified at 18 CFR §4.102-.107, et seq. (1984)). FERC Orders 255-A and 255 are set out in Appendix B.

JURISDICTION

By Order entered December 6, 1984, the Ninth Circuit Court of Appeals denied Petitioners' application for attorney fees and expenses, and their motion for reconsideration of an order denying costs. Appendix C. Petitioners do not seek review of the circuit court's denial of costs. On December 20, 1984, Petitioners submitted a Petition for Rehearing and Suggestion for Rehearing en

banc on Application for Attorney Fees. On December 21, 1984, the Court issued an Opinion "to explain in greater detail the basis of our decision." *Tulalip Tribes of Washington, et al. v. FERC,* 749 F. 2d at 1368. App. 2. The rehearing petition was denied by the Ninth Circuit Court of Appeals by Order entered February 15, 1985. Appendix C. This Court's jurisdiction is invoked under 28 USC §1254(1). *See also, United States v. Healy,* 376 U.S. 75, 77-78, 11 L. Ed. 2d 527, 531, 84 S. Ct. 553 (1964); *United States v. Dieter,* 429 U.S. 6, 50 L. Ed. 2d 8, 97 S. Ct. 18 (1976).

STATUTES INVOLVED

The Equal Access to Justice Act was passed in 1980, Pub. L. No. 96-481, Title II, 94 Stat. 2325, codified primarily at 5 USC §504, 28 USC §2412 (hereafter "EAJA"). Petitioners argued they should be awarded attorney fees under either of two sections of the EAJA, 28 USC §2412 (b) and 28 USC §2412(d). Section 2412(b) provides:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Section 2412(d) provides:

> (d) (1) (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The Ninth Circuit Court of Appeals determined that the Federal Energy Regulatory Commission was not subject to an EAJA attorney fee award by virtue of a provision of the Federal Power Act dealing with costs. The pertinent part of this provision, §317 of the Federal Power Act, 16 USC §825(p), provides:

> . . . No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

STATEMENT OF THE CASE

Petitioners incurred substantial attorney fees in successfully challenging the validity of a new FERC rule of broad national significance. In its new rule, the Commission provided a sweeping basis for the exemption of numerous small hydroelectric projects from the licensing requirements of the Federal Power Act. It claimed authority to do so under the Energy Security Act of 1980, Pub. L. 96-294, 95 Stat. 718 (1980) (codified at 16 USC §§2705, 2708 (1982)). Although the Energy Security Act, and the Public Utilities Regulatory Policies Act of 1978, limited

the Commission's exemption authority to projects at an "existing dam", or utilizing "natural water features . . . without the need for any dam or impoundment," the Commission's exemption rule provided for the exemption of projects with stream barriers as high as 10 feet and water impoundments as large as 2 acre feet. *See,* 16 USC §§2708(a); 2708(b) (2); 47 Fed. Reg. 38506, 38512. Appendix B. On appeal, the Commission did not dispute that the rule conflicted with the plain meaning of the Energy Security Act. As to the Commission's legislative history argument, the Ninth Circuit Court of Appeals found there was ". . . nothing in the legislative history or language of §2708(b) . . . which even hints . . ." at the Commission's interpretation of the Energy Security Act. *Tulalip Tribes of Washington v. FERC,* 732 F. 2d at 1455. App. 12.

Prior to invoking appellate jurisdiction pursuant to 16 USC §825*l* of the Federal Power Act, Petitioners sought a rehearing by the Commission and a stay of the new rule. Both requests were denied. At the time the rule was declared invalid by the circuit court, the Commission had granted, or was considering granting, about 287 natural water feature exemption applications, most of which had been filed after the denial of Petitioners' motion for stay. After the Ninth Circuit's decision, the Commission determined that 223 projects across the country would not be exemptible under the Court's interpretation of the Energy Security Act. *Pigeon Cove Power Co.,* 28 FERC ¶61,064 (1984); *Forward Power and Energy Co.,* 28 FERC ¶61,063 (1984); *Eagle Power Co.,* 28 FERC ¶61,061 (1984); *Snowbird, Ltd.,* 28 FERC ¶61,062 (1984).

In seeking an award of attorney fees against the Commission, Petitioners argued that FERC's position was not

only without substantial justification under §2412(d) of the Equal Access to Justice Act, but that the Commission had acted in bad faith, thereby justifying an attorney fee award under §2412(b) of the EAJA. However, the Ninth Circuit Court of Appeals interpreted the Federal Power Act to bar an award of "costs" in this type of proceeding, relying on 16 USC §825(p). The Court then construed the EAJA's attorney fee provisions to be inapplicable to any federal agency or commission against which costs cannot be awarded. Although it "sympathize[d] with petitioners' plight . . .," the Ninth Circuit Court of Appeals felt that it was statutorily precluded from ever awarding attorney fees against the Federal Energy Regulatory Commission under the Equal Access to Justice Act of 1980, in a dispute arising under the Federal Power Act. *Tulalip Tribes of Washington, et al v. FERC,* 749 F. 2d at 1369. App. 5.

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REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Court of Appeals' Interpretation Of The EAJA Conflicts With Decisions Of Other Circuit Courts Of Appeals On This Issue.

Subsequent to the denial of the attorney fee rehearing petition in the *Tulalip* case, the Circuit Court for the District of Columbia held that an individual who had successfully challenged the Commission's action in regard to a small hydroelectric exemption was entitled to an award of attorney fees under the EAJA, in spite of the bar to cost awards in the Federal Power Act, 16 USC

§ 825(p). *Hirschey v. FERC,* — F. 2d —, D.C. Cir. No. 82-2170, Opinion, filed April 19, 1985. In that case, the Court found that the Commission's cost/fee "linkage" argument was

> . . . based on patently flawed premises and a wholly untenable reading of EAJA.

Slip Opinion at 6. The Court said that adding the ability to recover costs as another statutory prerequisite to an attorney fee award under the EAJA required a "tortured reading of the statute," and that Congress obviously "knew how to use words of limitation when they were intended. . ." *Id.* at 7.

The DC Circuit also noted that at least three other circuit courts had rejected this "linkage" argument in regard to an award of attorney fees under § 2412(d) of the EAJA. *Id.* at 8. As to the *Tulalip* decision, the Court found

> . . . no good basis upon which to disagree with the position followed by a majority of the circuits that have considered the issue. . .

Id. at 9.

In *Washington Urban League v. Federal Energy Regulatory Commission,* the Third Circuit Court of Appeals had earlier rejected a similar argument by the Commission, in regard to the Natural Gas Act. The Court said that the argument that the ability to recover costs is a prerequisite to an EAJA attorney fee award did not even merit discussion. *Washington Urban League v. FERC,* 743 F. 2d 166, 167 n. 1 (3rd Cir. 1984).

Both the Fifth Circuit and Eighth Circuit Courts of Appeals had rejected the EAJA linkage argument when

offered by the United States Government in other contexts. *See, United States v. 329.73 Acres, Granada and Yalobusha Counties,* 704 F. 2d 800, 808 (5th Cir. 1983) (en banc) ("If there is an anomaly in the matter of *court costs,* either intentional or through inadvertance, the anomaly was created by Congress. Such an anomaly, if indeed it is one, does not justify our failure as a court to ignore Congress' plainly expressed intention that *attorneys' fees* and *litigation expenses* may be awarded in condemnation cases unreasonably litigated by the government."); *United States v. 341.5 Acres of Land, St. Louis County, Minnesota,* 751 F. 2d 924, 935 (8th Cir. 1984) ("the . . . 'in addition to any costs awarded pursuant to subsection [2412(a)]' language expresses the intent of Congress that under § 2412(d) (1) (A) qualified prevailing parties shall be awarded attorney's fees and, when available, costs as well").

Not only is the Ninth Circuit ruling in conflict with four other circuit courts of appeals that have addressed the issue, the ruling below is inconsistent with principles articulated in other Ninth Circuit decisions. *See, U.S. v. 101.80 Acres of Land, more or less, in Idaho Cty.,* 716 F. 2d 714, 722 (9th Cir. 1983) ("absent a clear indication that Congress meant 'cost-shifting' when it said 'fee-shifting', we are reluctant to deny to the land owners before us a recovery under section 2412 as amended simply because in earlier cases similarly situated land owners were denied recovery under a statute pertaining purely to costs and making no provision for an award of fees whatsoever."); *Metcalf v. Borba,* 681 F. 2d 1183, 1186-87 (9th Cir. 1982) (attorney fee requests under the Civil Rights Attorney Fee Award Act of 1976, 42 USC § 1988, are to

be distinguished from "cost" requests and should not be subject to rules governing cost awards).

2. This Case Raises An Important Issue Of Statutory Construction Whose Resolution Will Determine The Extent To Which The EAJA Is Successful In Deterring Government Abuses.

The broad remedial purposes of the attorney fee provisions of the Equal Access to Justice Act of 1980 have been widely recognized. The Act states the Congressional intent to reduce the financial obstacles to challenging unreasonable governmental action by requiring substantial justification in order for a governmental body to avoid an attorney fee award, and by allowing the application against the United States of the common law and statutory exceptions to the "American rule" regarding attorney fees. EAJA, § 202(a), 94 Stat. 2321, 2325 (1980). In addition to enabling persons to vindicate their rights without assuming enormous financial burdens, the EAJA of 1980 was also intended to reduce the incidence of government abuse. It was anticipated that the prospect of having to pay sizeable attorney fee awards when governmental entities overstepped their authority would induce administrators to behave more responsibly in the future, and that by exposing a greater number of governmental actions to adversarial testing, federal law would be administered with greater precision, efficiency and fairness in the interpretation of statutes and the formulation and enforcement of governmental regulations. *See, e.g., U.S. v. 341.45 Acres of Land, St. Louis Cty., Minn.*, 751 F. 2d at 930.

If the Ninth Circuit's ruling on this important issue is allowed to stand, FERC need not fear an attorney fee

award if it exceeds its authority under the Federal Power Act, at least in regard to activities within the Ninth Circuit's appellate jurisdiction. The Commission will undoubtedly pursue the linkage argument under the EAJA in other circuits that have not yet decided the issue. Furthermore, the ruling that suspectibility to a cost award is a prerequisite to an attorney fee award under the EAJA is not limited to cases arising under the Federal Power Act. Governmental abuses under the Natural Gas Act, in land condemnation proceedings, and in any other situation where a governmental entity is arguably immune from a cost award may now escape the EAJA. *See, Washington Urban League v. FERC, supra; U.S. v. 341.5 Acres of Land, St. Louis Cty., Minn., supra.*

The attorney fee provisions of the EAJA were not simply intended to benefit those individuals or groups who chose to challenge unreasonable governmental action. The Act was seen as serving a much broader public interest. As noted in the House Report:

> [t]he bill rests on the premise that a party who chooses to litigate an issue against the government is not only representing his or her own vested interest but is also refining and formulating public policy. . . Where parties are serving a public purpose, it is unfair to ask them to finance with their tax dollars unreasonable government action and also bear the cost of vindicating their rights.

H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. (1980), at 10, 1980 U.S. Code Cong. & Admin. News, 4984, 4989.

This case is a good example of how a successful administrative challenge can serve substantial public interests. The Petitioners in this case claimed that many of

the numerous hydroelectric projects which would be eligible for an exemption under the new Commission rule posed a substantial threat of harm to the public interest in protecting fish and wildlife resources and other environmental values. The Ninth Circuit Court of Appeals found that Congress intentionally restricted the Commission's exemption authority in order to avoid environmental problems that could result from new dams or impoundments. *Tulalip Tribes of Washington v. FERC,* 732 F. 2d at 1455. The numerous hydroelectric project proposals which will now require licenses under the *Tulalip* decision will be subjected to a detailed, Congressionally mandated public interest review in furtherance of this Congressional intent. *See, Udall v. FPC,* 387 U.S. 428 (1968).

3. Under The Ninth Circuit's Interpretation Of The EAJA, Even The Most Egregious Of Governmental Abuses Could Not Result In An Attorney Fee Award Against The United States.

The Petitioners argued that the Commission's handling of their long, repeated and continued efforts to obtain compliance with the law regarding authorization of new hydroelectric facilities evidenced a pattern of bad faith. They also complained of Commission misconduct during and following the appellate court review. One of the important public policies of the EAJA was to subject the United States, to the same extent as private litigants, to the equitable exceptions to the American rule regarding attorney fee awards, including the exception for bad faith conduct. *See,* H.R. Rep. 96-1418 at 17, 1980 USCCAN at 4996; *McQuiston v. Marsh,* 707 F. 2d 1086 (9th Cir.

1983). If followed, the Ninth Circuit ruling means that no matter how egregious the conduct of a governmental entity may be, it will be immune from an attorney fee award.

Petitioners' fear that the Commission, or other governmental bodies, will act in bad faith and in disregard of statutory responsibilities is not unfounded. Commission practices in implementing the Federal Power Act are currently the subject of an on-going Congressional investigation. In 1984, growing public concern about Commission abuses led to the initiation of oversight hearings by the House of Representatives' Subcommittee on Energy Conservation and Power of the Committee on Energy and Commerce. The comments of several members of Congress at the most recent hearing on September 11, 1984, are indicative of their view of the information gathered so far. After listening to the Commission chairman's responses to public complaints regarding the handling of hydro development applications, Congressman Dingell said:

> Mr. Chairman, I am just getting a feeling of what is going on here and I am being driven reluctantly to the conclusion that FERC either doesn't know or doesn't care about the statutes which are entrusted to their care. . .

Hearing before the Subcommittee on Energy Conservation and Power of the Committee on Energy and Commerce, H.R. 98th Cong., 2d Sess., September 11, 1984, Serial No. 98-192, p. 183. Congressman Swift expressed similar frustration with Commission resistence to public concerns about the handling of preliminary permit appli-

cations. *Id.* at 179. Congressman Weaver described the Commission's practices this way:

> The gist of my testimony is summed up by saying that Federal Energy Regulatory Commission has been thumbing its nose at local governments, at State governments and Federal agencies and [sic] its slipshod and fast and loose practices of issuing licenses and exemptions on these hydroprojects. We have an enormous amount of them, I believe as many as 700 now in the northwest and we cannot tolerate this much longer.

Id. at 31. The Chairman of the Subcommittee, Congressman Richard L. Ottinger said:

> The Commission has gone to great lengths to encourage new development while simultaneously ignoring other values that may be destroyed by such development. Some states and one region have developed comprehensive plans for the development and conservation of their waterways, but the Commission has refused to be guided by these plans, even though it is under the mandate to issue hydro licenses only where the license is "best adapted to a comprehensive plan", taking into account development as well as conservation.
>
> In my view the small hydro program is not being implemented consistently with protection of the public interest.

Id. at 1-2.

Congress had intended that the threat of substantial attorney fee awards be available to encourage the responsible and good faith implementation of federal law.

4. The EAJA Attorney Fee Issue Is Likely To Be A Recurring One And Will Impact A Substantial Amount Of Litigation.

At the September 11, 1984 oversight hearing regarding Commission practices, Chairman Ottinger reported:

> Significant elements of the Federal Energy Regulatory Commission's hydro regulations have been struck down by the courts over the past few months. Over 30 additional lawsuits are pending in this area. Many people complain that the FERC seems bent on promoting small hydro on virtually every stream and waterway at the expense of recreational, fish and wildlife and other values that may be inconsistent with development. Developers complain that the Commission operates at a turtle's pace on their applications even when there is a little disagreement over whether a license or an exemption should be issued.

Id. at 1-2. As indicated by Congresman Weaver, a great deal of the current interest in hydroelectric development is focused on rivers in the Pacific Northwest. Challenges to FERC decisions are likely to be more frequent in the Ninth Circuit. Among the petitioners in this case alone, there are at least six other generic challenges to FERC hydro policies in which attorney fees under the EAJA have or will be claimed, five of which are in the Ninth Circuit Court of Appeals. *See, National Wildlife Federation v. FERC,* D.C. Cir. No. 82-2434 (remanded May 20, 1983) (FERC sought administrative remand rather than face a decision by the court); *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC,* 746 F. 2d 466 (9th Cir. 1984) (attorney fee rehearing petition

pending, cert requested on decision on merits); *Sierra Club v. FERC,* 9th Cir. No. 84-7720; *Washington State Departments of Fisheries and Game and Tulalip Tribes v. FERC,* 9th Cir. No. 84-7669; *Washington State Departments of Fisheries and Game and Tulalip Tribes v. FERC,* 9th Cir. No. 85-7088; *National Wildlife Federation v. FERC,* 9th Cir. No. 84-7325.

Although § 2412(d) of the EAJA of 1980 has now expired, it remains a possibel basis for an attorney fee award in any action commenced before October 1, 1984. EAJA, § 204(c), Pub. L. 96-481. The recent expiration of § 2412(d) of the EAJA is generally viewed as a temporary situation. President Reagan vetoed the renewal of this provision because of certain proposed amendments, such as a broader definition of "position of the United States." However, he vowed to support its reauthorization in the next Congress, retroactive to October 1, 1984, stressing the important public policies served by such fee awards. Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. of Pres. Doc. 1811 (November 8, 1984). A new reauthorization bill has recently been introduced and is pending before the House Judiciary Committee. H.R. 2223. Furthermore, § 2412(b), which also provides for an attorney fee award "in addition to the costs which may be awarded pursuant to subsection (a)", remains in effect. Besides the substantial numbers of cases involving FERC's implementation of the Federal Power Act, land condemnation proceedings, proceedings under the Natural Gas Act, and an undetermined number of other regulatory practices may be affected by resolution of the cost/fee linkage argument.

CONCLUSION

The ruling of the Ninth Circuit Court of Appeals was not based upon the particular factual circumstances of this case. The Court made no determination of whether the Commission was substantially justified in its position or whether it acted in bad faith. It did not determine any of the factors customarily considered in deciding claims for attorney fees under the EAJA. Instead, the Court inferred an additional statutory prerequisite to attorney fee awards under the EAJA. Its decision stands alone, and in direct conflict with the rulings of four other circuit courts of appeal, as well as principles articulated in other Ninth Circuit cases. The decision in this case will serve to immunize the Federal Energy Regulatory Commission and other federal entities from the EAJA. The potential applicability of this ruling beyond the confines of this case is substantial. The ruling severely undermines the Congressional objectives of the EAJA. This case raises an important and far-reaching question of statutory construction which warrants resolution by this Court. Accordingly, Petitioners request that a writ of certiorari be issued.

DATED this 15 day of May, 1985.

Respectfully submitted,
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APPENDIX A-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7139

TULALIP TRIBES OF WASHINGTON,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 83-7140

UPPER SKAGIT INDIAN TRIBE, et al.,
Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 83-7149

NATIONAL WILDLIFE FEDERATION, et al.,
Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

OPINION

(Filed December 21, 1984)

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission
Submitted November 13, 1984

Before: WRIGHT and HUG, Circuit Judges, and EAST,* Senior District Judge

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* Of the District of Oregon.

WRIGHT, Circuit Judge:

In *Tulalip Tribes of Washington v. Federal Energy Regulatory Commission,* 732 F.2d 1451 (9th Cir. 1984), these petitioners prevailed in their challenge to a final rule adopted by the Federal Energy Regulatory Commission. Petitioners subsequently moved for an award of attorney fees under the Equal Access to Justice Act and sought reconsideration of the Clerk's denial of their cost bills.

On December 6, 1984, we denied the application for fees and the motion for reconsideration of the order denying costs. We write now to explain in greater detail the basis of our decision.

Petitioners base their request for some $50,000 in fees on 28 U.S.C. § 2412(d)(1)(A) (emphasis added):

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, *in addition to any costs awarded pursuant to subsection (a),* incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

We emphasize the reference to subsection (a) in this provision because it is critical to our analysis. The subsection provides, in pertinent part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil civil action brought by or against . . . any agency . . . of the United States . . . in any court having jurisdiction of such action.

The Commission contends that an award of costs is barred by the following language of section 317 of the Federal Power Act, 16 U.S.C. § 825p: "No costs shall be assessed against the Commission in any judicial proceeding under this chapter." The Commission argues further that this statutory bar to the award of costs precludes the award of attorney fees under 28 U.S.C. § 2412(d)(1)(A); that is, that no award of fees "in addition to any costs awarded pursuant to subsection (a)" is possible because no costs may be awarded.

Although the statute does not mention expressly the question of attorney fees, the Commission's point of view is compelling. If the award of costs is specifically barred, can Congress have meant to permit an award of attorney fees?

Petitioners urge two reasons why section 825p should not bar the award of fees and costs, and a third reason why fees should be allowed even if costs cannot be awarded. They contend that: (1) the statute bars the award of costs only in proceedings brought under that specific section; (2) their action was not brought "under this chapter" within the meaning of the statute because they asserted violations of other statutes in addition to the Federal Power Act; and (3) fees can be awarded under EAJA even if the award of costs is barred. We find none of these contentions persuasive.

Petitioners' first contention rests on the fact that the bar to the award of costs is found at the end of a lengthy section dealing with the jurisdiction of district courts over civil and criminal actions to enforce provisions of the Federal Power Act. They then contend that

the bar should be inapplicable to actions brought directly in the court of appeals under 16 U.S.C. § 825*l* to review Commission rule-making decisions.

Petitioners' theory cannot survive a plain reading of the statute. Congress did not choose merely to bar an award of costs for cases brought "under this section." It barred the award in cases brought "under this chapter."

In the original version of the statute, the bar applied to cases brought "under this Act," meaning the Act of June 10, 1920, now known as the Federal Power Act and classified generally as chapter 12 of title 16 [16 U.S.C. §§ 791a-793, 795-797, 798-818, 820-825r]. See 16 U.S.C. § 825p note.

Petitioners based jurisdiction in this court on 16 U.S.C. § 8251, the only available statute. That section was part of the original Act of June 10, 1920, and is part of the chapter referred to in section 825p. See 16 U.S.C. § 825*l* note. We reject petitioners' attempt to limit the reach of the ban on cost and fee awards to cases brought under section 825p alone.

Petitioners' second contention is equally meritless. Although they asserted violations of statutes other than the Federal Power Act, their action was and could have been brought only "under this chapter" of title 16. Subsequent congressional expansion of the substantive issues reviewable in a proceeding brought under that grant of jurisdiction in no way avoids the statutory bar to the award of costs and fees.

Petitioners' third contention concedes, for purposes of argument, the ban on cost awards but seeks nonethe-

less to give rise to a right to attorney fees under EAJA. Simply stated, their theory is that attorney fees are not expressly precluded by section 825p and that fees may be awarded under EAJA "in addition to any [i.e., zero] costs. . . ."

Although this theory is the only one raised by petitioners that is not squarely precluded by the language of section 825p, we nonetheless find it unpersuasive. We find no indication in the legislative history of EAJA that Congress meant to expand the rights of litigants in proceedings under the Federal Power Act. *Compare United States v. 101.80 Acres of Land,* 716 F.2d 714 (9th Cir. 1983) (legislative history of EAJA demonstrated congressional intent to permit condemnees obtaining greater compensation to receive costs and attorney fees despite continued use of "prevailing party" language that, prior to EAJA, had been held not to include them for purposes of cost awards).

Prior to the enactment of EAJA, costs could generally be awarded against the United States but fees were barred. EAJA removed the bar to fee awards by making them available "in addition to . . . costs" but did not expressly create a right to fees if the award of costs was barred.

Although we sympathize with petitioners' plight, we are not free to disregard the statutory bar of 16 U.S.C. § 825*l*.

APPLICATIONS FOR ATTORNEY FEES AND MOTION FOR RECONSIDERATION OF ORDER DENYING COSTS DENIED.

APPENDIX A-2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7139

THE TULALIP TRIBES OF WASHINGTON,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 83-7140

UPPER SKAGIT INDIAN TRIBE, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 83-7149

NATIONAL WILDLIFE FEDERATION, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

OPINION

(Filed May 10, 1984)

On Petition for Review of Orders of the
Federal Energy Regulatory Commission
Argued and Submitted February 9, 1984

Before: WRIGHT and HUG, Circuit Judges, and EAST,* District Judge

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

EAST, District Judge:

Petitioners challenge the Federal Energy Regulatory Commission's final rule authorizing case-specific exemptions from federal licensing requirements for small hydroelectric projects that use "diversion structures" no taller than ten feet and impound no more than two acre-feet of water. We hold that the rule violates the Public Utilities Regulatory Policies Act of 1978 (PURPA), as amended by the Energy Security Act of 1980 (ESA), 16 U.S.C. §§ 2706, 2708(b), and is therefore invalid.

BACKGROUND:

The Federal Power Act, 16 U.S.C. §§ 791a-828c (1982), generally prohibits construction or operation of hydroelectric facilities without a license from the Federal Energy Regulatory Commission (Commission). *See* 16 U.S.C. § 817. In recent years Congress has created exemptions for certain classes of small hydroelectric projects. PURPA directs the Commission to establish simplified licensing procedures for small projects at "existing dams." 16 U.S.C. § 2705. PURPA specifically states: "Nothing in this chapter authorizes (1) the loan of funds for construction of any new dam or other impoundment, or (2) the simple and expeditious licensing of any such new dam or other impoundment." 16 U.S.C. § 2706.

The Energy Security (ESA) amended PURPA to broaden the Commission's authority to exempt projects from the normal licensing procedures. ESA § 408, 16 U.S.C. § 2708. The ESA allows the Commission to exempt projects that utilize "natural water features for the

generation of electricity, without the need for any dam or impoundment . . . .'' 16 U.S.C. § 2708(b).

On September 3, 1980, the Commission proposed a rule to implement § 2708(b). This proposed rule defined "dam'' broadly as "any structure for impounding water.'' 45 Fed. Reg. 58,368, 58,371 (1980). A few months later, on November 18, 1980, the Commission issued a new rule which defined "dam'' as "any structure for impounding water, including any diversion structure that is designed to obstruct all or substantially all of the flow of a natural body of water.'' 45 Fed. Reg. 76,115, 76,124 (1980).

The Commission proposed a different rule on November 10, 1981. 46 Fed. Reg. 55,536, 55,540 (1981). It redefined "dam'' as "any structure for impounding water which is usable for electric power generation, if the impoundment supplies all, or the substantial part of, the total hydroelectric pressure (head) developed for such generation.'' This new rule authorized the Commission to exempt projects that use a "diversion structure'' of no greater than six feet in height and impound no more than one acre-foot of water. 46 Fed. Reg. at 55,540.

The Commission issued a final rule on August 27, 1982. 18 C.F.R. § 4.102(a) (1) (2) (iii) (A) and (B) (1983); 47 Fed. Reg. 38,506, 38,512 (September 1, 1982). The final rule retained the narrow definition of "dam.'' 18 C.F.R. § 4.102(a). It increased the limitations on "diversion structures'' eligible for exemption to allow structures up to ten feet in height which do not retain more than two acre-feet of water. 18 C.F.R. § 4.102(1) (2) (iii) (A) and (B).

Petitioners sought a rehearing on the final rule, claiming that it violated the statutory provisions limiting exemptions to projects which require no new dam or impoundment. *See* 16 U.S.C. §§ 2706, 2708(b). Petitioners also claimed that the Commission violated NEPA by failing to prepare an environmental impact statement before adopting the final rule. The Commission denied the rehearing on December 29, 1982. 21 FERC ¶ 61,369 (1982).

DISCUSSION:

In reviewing an administrative rule, courts will often defer to the agency's interpretation of the statute authorizing the rule. *See Hein v. Oregon College of Education,* 718 F.2d 910, 914 n.3 (9th Cir. 1983). The Supreme Court has noted, however, that any discussion of deference is "pointless" if the agency interpretation violates "the plain language of the Act as well as the statutory purposes revealed by the legislative history." *FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31 (1981). The courts are the final authorities on issues of statutory construction and must reject administrative constructions that are inconsistent with the statutory mandate. *Id.* at 32.

The statutory provision at issue, 16 U.S.C. § 2708(b), authorizes an exemption from the normal hydroelectric project licensing procedures for "any project which utilizes or proposes to utilize natural water features for the generation of electricity, *without the need for any dam or impoundment. . . .*" (Emphasis added). The language of § 2708(b) plainly states that only those projects that do not require a dam or impoundment are eligible for the exemption. As noted previously, in its final rule the Com-

mission defined "dam" to exclude "dams" which are built only to divert water rather than to create hydroelectric pressure. 18 C.F.R. § 4.102(a) (1983). In conjunction with this definition of "dam," the final rule authorizes exemptions for projects that utilize a "diversion structure" no higher than ten feet and which "retains" no more than two acre-feet of water. 18 C.F.R. § 4.102(1) (2) (iii) (A) and (B).

The structures authorized by the final rule clearly fall within the plain meaning of "any dam or impoundment." Webster's Third International Dictionary (1981) defines "dam" as "a barrier preventing the flow of water." The American Heritage Dictionary (New College Edition 1976) defines "dam" as "(1) A barrier constructed across a waterway to control the flow or raise the level of water . . . (3) Any obstruction or hindrance." The Commission has recognized the plain meaning of "dam" in defining that term in three other regulations. *See, e.g.*, 18 C.F.R. § 4.50(b) (1) (1983) ("'Dam' means any structure for impounding or diverting water"); 18 C.F.R. § 4.91(c) (1983) ("'Dam' means any structure that impouds water"). In its original rule implementing 16 U.S.C. § 2708(b), the Commission had defined "dam" to include diversion structures which obstructed all or substantially all of the flow of a natural body of water. 45 Fed. Reg. 76,115, 76,124 (1980). The final rule authorizes exemptions for projects that utilize a structure which is a "dam" and produces an "impoundment" and therefore the rule violates the plain language of 16 U.S.C. § 2708(b).

The Commission asserts that while these structures may literally be "dams," such a literal reading of the

statute would frustrate Congress' intent. The Commission points to the legislative history of the Energy Security Act in arguing that the terms "any dam or impoundment" should not be given their plain meaning. Although a court is not absolutely forbidden from considering the legislative history when construing a statute which is plain on its face, *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 872 (9th Cir. 1981), it is "a step to be taken cautiously." *Rivera v. Becerra*, 714 F.2d 887, 893 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3687 (U.S. Mar. 19, 1984), (quoting *Piper v. Chris-Craft Industries*, 430 U.S. 1, 26 (1977)). This court has stated:

> [I]f evidence drawn from the face of the statute militates strongly from one interpretation, but not quite so strongly that the legislative history may safely be ignored, the legislative history should be considered, but considered cautiously. Under these circumstances a second interpretation should be accepted on the basis of the legislative history *only if the evidence is very strong, which will usually require explicit language.*

Heppner v. Alyeska Pipeline Service Co., 665 F.2d at 873 (emphasis added).

The legislative history of 16 U.S.C. § 2708(b) is scanty and inconclusive. The natural water feature exemption in § 2708(b) was added to the Energy Security Act in conference. The House conference report states that this exemption was added "to include projects which are located at sites where there is no need for an impoundment structure." H.Conf.Rep. No. 1104, 96th Cong., 2d Sess. 276, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2077, 2171. The Commission asserts that "impoundment structure" means a structure built for the *purpose* of impounding water. It argues that the purpose of the structures

authorized by the final rule is diversion, not impoundment, and those projects thereby come within the exemption as intended by Congress. There is nothing in the legislative history or language of § 2708(b), however, which even hints at this distinction between the purpose of the structure and its effect.

The Commission argues that its rule is consistent with Congress' intent as expressed in the House conference report. Even if we accept the Commission's argument, such consistency by itself cannot alter the plain meaning of § 2708(b). The Commission has not presented the "very strong" evidence or explicit language supporting its interpretation which is necessary to overcome the plain meaning drawn from the language of the statute. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d at 873. Absent a clearly expressed legislative intention to the contrary, the statutory language must be regarded as conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The Commission asserts that adhering to the literal definitions of "dam" and "impoundment" would greatly reduce the number of projects eligible for exemption under § 2708(b) and frustrate the congressional purpose to promote small hydroelectric development. In passing PURPA and the ESA, Congress clearly intended to expedite and encourage development of small hydroelectric energy projects. *See, e.g.*, ESA § 402, 42 U.S.C. § 7371 (Supp.V 1981). Interpreting "dam" and "impoundment" according to their plain meanings will not frustrate this purpose. Projects using natural water features such as a perched lake or waterfall come within the exemption

and can proceed in an expeditious manner as intended. As the Commission admits, such projects have already been proposed.

In addition to encouraging small hydroelectric projects, it is equally clear that Congress intended to protect the environment and confine *exemptions* to sites where there is no need for any dam or impoundment. PURPA originally allowed exemptions only for projects at existing dams. 16 U.S.C. § 2705(a) (1982). The added exemption of § 2708(b) applies only to projects without any dam or impoundment. Congress has explicitly stated that nothing in 16 U.S.C. §§ 2701-2708 authorizes the simple and expeditious licensing of any new dam or other impoundment. 16 U.S.C. § 2706 (1982). Projects involving new dams or impoundments can still be built but must go through the normal licensing procedures.

The natural water feature exemption in § 2708(b) is limited to those projects which will operate "without any adverse effect upon such natural water features." 16 U.S.C. § 2708(b). The natural water features to be protected include the water flow and water level. H.Conf. Rep. No. 1104, 96th Cong., 2d Sess. 276, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2077, 2172. Construing "dam" and "impoundment" consistently with their plain meanings, thus denying exemptions for projects with diversion structures, advances Congress' intent to protect the natural water features. The Commission's final rule, which allows structures up to ten feet in height that impound up to two acre-feet of water, authorizes exemptions for projects which clearly affect the water flow and water level, inconsistent with Congress' intent.

Since we hold that the Commission's final rule is invalid, we do not reach petitioners' assertion that the Commission should have prepared an environmental impact statement before adopting the rule.

The petition is GRANTED and the rule is INVALIDATED.

APPENDIX B-1

21 FERC ¶61,369

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Part 4]

Amendments to Regulations Governing Case-by-Case Exemption From All Or Part Of Part I Of The Federal Power Act For Small Hydroelectric Power Projects With An Installed Capacity Of 5 Megawatts Or Less

(Docket Nos. RM82-2-000, RM82-2-001 RM82-2-002, and RM82-2-003)

(Issued December 29, 1982)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order Denying Rehearing, Denying Leave to Add Party on Rehearing, and Denying Stay of Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing an order that denies three petitions for rehearing of Order No. 255. Order No. 255 is the final rule amending the definition of "small hydroelectric power project" to provide the criteria for a natural water feature project, a type of small hydroelectric power project, that may be exempted fom certain provisions, including licensing provisions, of Part I of the Federal Power Act. The order also denies the requests for a stay of the final rule and the request for leave to add

a party on rehearing. The reasons for this action are detailed in the Commission's order.

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DC-C-43

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting Chairman; J. David Hughes, A. G. Sousa and Oliver G. Richard III.

Docket Nos. RM82-2-000
RM82-2-001
RM82-2-002
RM82-2-003

Amendments To Regulations Governing Case-By-Case Exemption From All Or Part Of Part I Of The Federal Power Act For Small Hydroelectric Power Projects With An Installed Capacity of Five Megawatts Or Less

ORDER NO. 255-A

ORDER DENYING REHEARING, DENYING ADDITION OF A PARTY ON REHEARING, AND DENYING STAY OF FINAL RULE
(Issued December 29, 1982)

I. *INTRODUCTION*

On August 27, 1982, the Federal Energy Regulatory Commission (Commission) issued a final rule amending the definition of "small hydroelectric power project" to

provide specific guidance on what constitutes a "natural water feature" project.[1] Under the 1980 amendments to the Public Utility Regulatory Policies Act (PURPA),[2] any small hydroelectric power project that utilizes, for electric power generation, a natural water feature may be exempted from certain provisions of Part I of the Federal Power Act, including licensing requirements. As provided in the final rule, these natural water feature projects must meet certain criteria to qualify for exemption under existing case-specific exemption procedures.[3]

II. *PETITIONS FOR REHEARING, STAY OF FINAL RULE, AND FOR LEAVE TO ADD A PARTY*

The Commission has received timely petitions for rehearing of the final rule from the following petitioners:

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1 Docket No. RM82-2-000, Order No. 255, 47 *Fed. Reg.* 38,506 (Sept. 1, 1982). The final rule also contains a number of procedural clarifications for filings related to small hydroelectric power projects. These procedural elements of the final rule are not at issue on rehearing.

Also, the final rule inadvertently bore an erroneous order number (No. 225) when it was issued. This was corrected on September 10, 1982. In keeping with the petitioner's request, the Commission is treating all references to Order No. 225 in the rehearing petitions as being references to Order No. 255.

2 Sections 405 and 408 of PURPA, 16 U.S.C. §§ 2705, 2708, were amended by section 408 of the Energy Security Act of 1980 (ESA), Pub. L. 96-294, 94 Stat. 611.

3 The procedures for case-specific exemption were established in Final Rule, "Exemption From All Or Part Of Part I Of The Federal Power Act Of Small Hydroelectric Power Projects With An Installed Capacity of Five Megawatts Or Less," issued November 7, 1980, Docket No. RM80-65, Order No. 106, 45 *Fed. Reg.* 76,115 (Nov. 18, 1980).

Tulalip Tribes of Washington (Docket No. RM82-2-001); Upper Skagit Indian Tribe, Swinomish Tribal Community, Sauk-Suiattle Indian Tribe, Skagit System Cooperative, and Point No Point Treaty Council (Docket No. RM82-2-002); and National Wildlife Federation, Idaho Wildlife Federation, Montana Wildlife Federation, Natural Resources Defense Council, Inc., Friends of the River, Trout Unlimited, Inc., Tulalip Tribes of Washington, and Columbia River Inter-Tribal Fish Commission (Docket No. RM 82-2-003). The rehearing petitions in Docket Nos. RM82-2-001 and RM82-2-002 also contained requests for stay of the final rule pending final action, ostensibly including judicial review if any.

The Commission also received a Petition for Leave to Add Friends of the Earth, Inc. as a party to the rehearing petition filed in Docket No. RM82-2-003. The petition to add this additional party was filed after the 30-day statutory period for requesting rehearing had elapsed. The Commission cannot alter the 30-day jurisdictional parameters set by statute.[4] For that reason, the Commission is not permitting the inclusion of Friends of the Earth, Inc. as a party on rehearing.

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[4] The courts have held that the 30-day filing requirement is jurisdictional and that the Commission is without authority to extend the time period. *E.g.*, Boston Gas Company v. FERC, 575 F.2d 975 (1st Cir. 1978); Southern Union Gathering Company v. FERC, No. 81-4464, 5th Cir., Slip Opinion (September 27, 1982). To permit the addition of a party after 30 days is to confer upon that party the ability to seek rehearing and judicial review when the governing statute would otherwise foreclose such rights.

III. *DISCUSSION*

A. *Implementation of the Energy Security Act of 1980 (ESA)*

All three rehearing petitions take issue with the manner in which the final rule implements, in part, the exemptions provided for in the 1980 ESA amendments to PURPA. Petitioners argue that the Commission has exceeded its statutory authority under the ESA by defining a natural water feature project to allow it to include a diversion structure. Petitioners also argue that the final rule, in considering the "gradient of a natural stream" as a type of natural water feature under sections 405 and 408 of PURPA, makes diversion-type hydroelectric projects eligible for exemption contrary to the intent of Congress.

1. *Statutory Framework*

When the 1980 amendments to PURPA were enacted, Congress did not provide guidance on the meaning of the term "natural water feature." Instead, Congress authorized the Commission, in its discretion, to determine by rule or order which projects may be exempted.[5] In doing so,

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[5] Section 408(b) of the ESA states that:

> The Commission may in its discretion (by rule or order) grant an exemption in whole or in part from the requirements (including the licensing requirements) of part I of the Federal Power Act to small hydroelectric power projects having a proposed installed capacity of 5,000 kilowatts or less, on a case-by-case basis or on the basis of classes or categories of projects . . . .

(Continued on following page)

the Commission is directed by the ESA to ensure that a natural water feature project generates electricity "without the need for any dam or impoundment" in a manner that will achieve the purposes of Title IV of the Energy Security Act and in a manner which will do so "without any adverse effect upon such natural water features."

2. *Nature of the Exemption Process*

The case-specific exemption procedures that the Commission adopted on November 7, 1980, did not define the term "natural water feature." Absent experience with specific natural water feature project proposals at that time, the Commission could not provide generic guidance on what types of natural water feature projects should be exemptible. The Commission instead elected to consider applications for natural water feature projects on an *ad hoc* basis under the case-specific exemption procedures. This rule is intended to provide the generic guidance on natural water feature projects that has not heretofore been included in these exemption procedures.

Under these procedures, of which this final rule is a part, any exemption (including one for a natural water feature project) that is granted will contain appropriate

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(Continued from previous page)

In addition, section 408(c) of the ESA states, in pertinent part, that "small hydroelectric power projects" are to include:

> . . . any project which utilizes or proposes to utilize natural water features for the generation of electricity, without the need for any dam or impoundment, in a manner which (as determined by the Commission) will achieve the purposes of this title and will do so without any adverse effect upon such natural water features.

terms and conditions prescribed by the relevant state and federal fish and wildlife agencies.[6] This is a statutory requirement.[7] These types of terms and conditions can address the various environmental considerations raised in the rehearing petitions. These include, among other things, fish migration, fish habitat, spawning gravel, stream flows, sediment and other natural bedload movement, water quality, and water temperature.

In any case, each exemption application is examined by the Commission to determine whether the project will cause any adverse environmental effects not otherwise remedied by terms and conditions proposed by the state and federal fish and wildlife agencies. If potential adverse impacts are identified, the Commission includes in the exemption additional environmental terms and conditions designed to avert those adverse impacts.[8]

3. *The "Natural Water Feature" Rule*

The final rule at issue here provides specific criteria for determining whether a project that uses a "natural water feature" for electric power generation qualifies for

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6 18 C.F.R. §§ 4.105(b) (3), 4.106(b), 4.107(e) (3).

7 See section 30(c) of the Federal Power Act, 16 U.S.C. § 823a(c); section 405(d) of PURPA, 16 U.S.C. § 2705(d).

8 This may include any terms and conditions necessary to protect legally recognized treaty rights of Indian tribes, particularly with respect to anadromous fish. *E.g.*, United States v. Washington (Phase II), 506 F. Supp. 187 (W.D. Wash. 1980). The Commission's review is not, however, limited solely to environmental matters. It includes, for example, the subjects mentioned in 18 C.F.R. § 4.105(b) (6).

mission as referring to structures that perform the conventional role of a dam or impoundment—the artificial creation or increase of hydraulic head needed to generate electricity or needed for the storage and release of water.[9] There are fundamental differences between a project requiring the artificial creation of head to generate electricity and a project located at a site where the gradient of a natural stream is itself steep enough to provide the necessary hydraulic head. In the case of this latter type of project, only a diversion structure is needed to direct a portion of the natural stream flow into an intake pipe or penstock. The diversion structure's purpose is not to create a hydraulic head at the dam or impoundment. Moreover, no scheme of periodic storage and release of water is involved. The criteria in the final rule are drafted to incorporate this important distinction between dam projects and diversion-type projects. The Commission adheres

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[9] This view of "dam" and "impoundment" under the ESA versus "diversion structure" is consistent with other definitions of "dam," which stress that the use and effect of the structure are important elements of any definition. For example, one preferred definition of a dam states that it is a "barrier . . . built across a watercourse *to confine and keep back flowing water.*" *Webster's Third New International Dictionary* 571 (1976) (emphasis added). Diversion-type structures are not built for these purposes.

Petitioners cite Lake Ontario Land Dev. & Beach Prot. Ass'n v. FPC, 212 F.2d 227, 232 (D.C. Cir. 1954) for the proposition that a barrier that extends only partially across a stream is a "dam". The court's dictum on this point is inapposite since it was offered merely as an analog to the real issue before the court: whether the FPC could license only part of the structures that extend completely across the St. Lawernce River into Canada. The dams in *Lake Ontario* are, in fact, the kinds of structures designed to create hydraulic head artifically and to store and release water on a periodic basis.

to the view that diversion structures which meet the criteria in the final rule are not dams or impoundments in the conventional sense.[10]

Nothing in the ESA or its legislative history indicates that the water feature at which natural hydraulic head most frequently occurs—"the gradient of a natural stream" —should not be included among those natural water features that can be used in projects otherwise eligible for exemption. Consequently, any definition of natural water feature projects should include diversion-type projects that are capable of utilizing this type of natural hydraulic head.[11]

The distinction between natual water feature projects and those other types of projects using artificially-created head exists also as a matter of engineering and economics. While all streams have some degree of natural gradient, the use of a diversion structure for electrical generation is economically infeasible absent a precipite gradient. In additon, projects on low-head streams could not use diver-

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[10] The petitioners' suggestions that flumes, simple intake boxes, or Raney wells could be used at natural water feature sites, rather than diversion structures, are not feasible from an engineering point of view for the vast majority of small hydroelectric power projects. In addition, limiting exemptions only to waterfall sites and elevated natural lakes would signicantly affect the Commission's ability to carry out the mandate in section 402 of the ESA to encourage hydropower development.

[11] To ensure the distinction between natural water feature projects and those using hydraulic head that is artifically created by a dam or impoundment, the final rule contains a limitation on any increase in the naturally-occurring hydraulic head at the site of a natural water feature project. 18 C.F.R. § 4.102(1) (2) (iii) (C).

sion structures under ten feet in height and still be within the other criteria established in this rule, such as the five percent limitation on the increase in the naturally-occurring head at the site. These natural limitations and the other safeguards in the final rule help to ensure that exemptions are available only to a select group of natural water feature projects and not, as petitioners imply, to a variety of conventional projects that use dams and man-made impoundments.

The Commission believes that the final rule meaningfully implements the Energy Security Act, taking into account the purpose of Congress in establishing the natural water feature project exemption and the actual statutory language of section 408 of the ESA. The petitioners have not raised any arguments on rehearing with respect to the provisions of the ESA that demonstrate that the rule exceeds the authority granted to the Commission in the ESA.

B. *National Environmental Policy Act (NEPA)*

The petitioners also argue that the Commission has failed to meet its responsibilities under NEPA [12] to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) prior to the promulgation of this rule. As stated above, this rule is procedural

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[12] 42 U.S.C. §§ 4321 *et seq.* Since the petitioners also cite regulations of the Council on Environmental Quality, the Commission would note that, as an independent regulatory agency, it is not bound by such regulations.

in nature. It does not constitute any proposed action by the Commission with respect to any exemptible project.[13]

On the other hand, Commission approval of an exemption for a natural water feature project may constitute a "major federal action" that could significantly affect the quality of the human environment. The "proposal" for such action is the actual filing of a project application by a project developer.[14] Thus, the Commission's approval of exemptions for small hydroelectric power projects are, of course, subject to NEPA. Therefore, under the procedures established to administer the exemption process, the Commission examines such exemption applications when filed, both in terms of their individual environmental impacts and, to the extent necessary, in terms of any cumulative impacts. However, the actual establishment of those exemption procedures is not the type of action which

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[13] A major federal action must be proposed before NEPA applies. *See, e.g.,* Andrus v. Sierra Club, 442 U.S. 347 (1979); Kleppe v. Sierra Club, 427 U.S. 390 (1976).

[14] The Supreme Court has recognized a distinction between agencies which license the activities of other persons and agencies which themselves put forth a program for development. *E.g.,* Kleppe v. Sierra Club, 427 U.S. 390, 399-404, 419 n.1 (1976); Flint Ridge Dev. Co. v. Scenic River Ass'n, 426 U.S. 776, 791 n.13 (1976). As Justice Marshall, author of the *Flint Ridge* opinion, stated in *Kleppe:*

> In *Flint Ridge,* in considering whether an agency should begin work on an impact statement arguably necessary for federal approval or certain private action by a real estate developer, we rejected the claim that the agency should begin work before the private action was submitted to the agency. "The agency could not fruitfully begin the impact statement until the developer's plans were fully or largely worked out."

390 U.S. at 419, n.1 (separate opinion concurring in part and dissenting in part).

requires an EA or EIS, given the procedural nature of that "action" and the environmental analyses which are performed in connection with the exemption applications that are actually filed.

Under NEPA, therefore, the appropriate stage for environmental analysis in connection with natural water feature project exemptions is after an application is filed with the Commission. To attempt to invoke NEPA at an earlier point would be meaningless since it would, at best, involve pure speculation on where potential developers might decide to build these types of projects. This would also divert Commission resources away from the critical project-related environment analyses.[15] The Commission, therefore, declines to accept petitioners' contention that a programmatic environmental assessment is required for this procedural regulation.[16]

C. *Waiver Provision*

Petitioners also object that the waiver provisions in 18 C.F.R. § 4.103(d) in the final rule are open-ended and

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15 *Kleppe, supra* note 14; *Flint Ridge, supra* note 14.

16 Only on rehearing has the issue of NEPA been raised. In that regard, the Upper Skagit Tribe petition claims that they were not informed of the "real environmental impacts" of the rule. The tribes can only be informed of the real environmental impacts of this rule in the context of the projects which are sought to be developed through the procedures established. Conceivably, there would be very little impact if very few applications for exemptions are filed. On the other hand, where a massive number of applications are filed, the environmental impacts would become more obvious. There is nothing inherent in this procedural rule that would reveal, by any length of study, what the "real environmental impacts" would be for future projects that are now known only to potential developers.

too ambiguous. Section 4.103(d)(2) permits a developer to file for an exemption where the project in question exceeds, to some degree, specific criteria which would otherwise apply. Given the limitations specifically enumerated in § 4.103(d)(2), the waiver provision cannot, in any way, be construed to absolve a potential developer from taking either the necessary fish and wildlife protection measures mandated by the state or federal agencies involved or the other terms and conditions imposed by the Commission.

The Upper Skagit Indian Tribe, *et al.* argue that the waiver provisions in § 4.103(d)(1) can be used to waive any part of the regulations, including the specific waiver provisions in § 4.103(d)(2). This is not so. Various statutes provide definite parameters within which the Commission must act. Section 4.103(d)(1) expressly recognizes this restriction and requires that any waiver must be consistent with the ESA. Obviously, the Commission cannot waive other statutorily-based obligations, including those arising under NEPA. Finally, the waiver provisions of § 4.103(d)(2) are specific in nature and the general provisions of § 4.103(d)(1) are not to be used to undo what the Commission has accomplished in this rule. As stated in the final rule and its preamble, waivers will be granted only where a petitioner can demonstrate both that it is reasonable to waive otherwise applicable criteria and that the waiver would not cause new, significant enviornmental impacts.

Based upon the arguments in the rehearing petitions, the Commission cannot agree that providing a degree of procedural flexibility through the limited waiver provisions in § 4.103(d)(2) will precipitate adverse effects on

the environment, given the other protective measures built into the exemption process.

D. *Other Arguments*

Petitioners present a number of other arguments in their rehearing petitions with respect to the adequacy of notice, the sufficiency of the administrative record, and delegation of certain NEPA obligations. The Commission believes that the rulemaking procedures used in this proceeding and the final rule itself sufficiently meet all such other arguments without the need for further explication or amendment of the regulations.

E. *Requests for Stay of Final Rule*

Both the Tulalip Tribes of Washington and the Upper Skagit Indian Tribe, *et al.* (Docket Nos. RM82-2-001 and RM82-2-002 respectively) request a stay of the final rule. In their requests, neither petitioner has met the burden of demonstrating that such extraordinary action is warranted. Petitioners, in summary fashion, allude to the expense of intervention with respect to exemption applications that are filed and to the "expanded class" of projects that can qualify for exemption.

The decision on whether to grant a stay of a final rule is a matter within the sound discretion of the Commission.[17] As discussed earlier, a natural water feature project exemption will become effective only after state and federal environmental reviews. Even then, the exemption

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[17] Under the Administrative Procedure Act, the Commission may grant a stay when it determines that "justice so requires." 5 U.S.C. § 705.

will be subject to the standard terms and conditions set forth in § 4.106 and may contain othe terms and conditions imposed under section 30(c) of the Federal Power Act. In the absence of a more concrete demonstration by petitioners that there is a reasonable potential for actual and irreparable harm from this procedural rule and that the balance of equities favors such a stay, the Commission declines to exercise its discretion and order a stay.

FOR THE FOREGOING REASONS, THE COMMISSION ORDERS THAT:

(1) the Petitions for Rehearing in Docket Nos. RM82-2-001, RM82-2-002, RM82-2-003 are hereby denied;

(2) the Petition for Leave to Add Friends of the Earth, Inc. as a Party is hereby denied; and

(3) the two requests for a stay of the final rule are also hereby denied.

By the Commission.

(SEAL)

/s/ Lois D. Cashell,
Acting Secretary

APPENDIX B-2

DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission

18 CFR Part 4

[Docket No. RM82-2-000]

Amendments to Regulations Governing Case-by-Case Exemption From All or Part of Part I of the Federal Power Act for Small Hydroelectric Power Projects With An Installed Capacity of 5 Megawatts or Less

Issued: August 27, 1982.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission is issuing a final rule amending the definition of "small hydroelectric power project" to provide specific guidance on what constitutes a natural water feature project that may be exempted from certain provisions, including licensing provisions, or Part I of the Federal Power Act. The definition establishes certain criteria that a natural water feature project must meet to qualify for exemption under existing case-specific exemption procedures.

The final rule also provides limitations on the filing of notices of intent to file certain competing applications for a natural water feature project and two other types of hydroelectric power projects. In addition, the final rule clarifies the documentation required of an exemption

applicant regarding the pre-filing consultation process with other federal or state fish and wildlife agencies.

The final rule is expected to reduce uncertainty with respect to, and expedite the filing and consideration of, initial applications and competing applications for exemptible natural water feature projects.

EFFECTIVE DATE: October 1, 1982.

FOR FURTHER INFORMATION CONTACT:

Fredric D. Chanania, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, D.C. 20426 (202) 357-8033.

SUPPLEMENTARY INFORMATION:

Issued: August 27, 1982.

In the matter of amendments to regulations governing case-by-case exemption from all or part of Part I of the Federal Power Act for Small Hydroelectric Power Projects with an Installed Capacity of 5 Megawatts or Less. [Docket No. RM82-2-000]; Order No. 225; Final Rule.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending its regulations to define those small hydroelectric power projects which utilize a "natural water feature" for the generation of electricity and which are currently eligible for exemption under the case-specific procedures in §§ 4.101-4.108 of the Commission's reg-

ulations.[1] These case-specific procedures provide for the exemption of small hydroelectric power projects of 5 megawatts (MW) or less from certain provisions, including licensing provisions, of Part I of the Federal Power Act (16 U.S.C. 792-824) under the authority of sections 405 and 408 of the Public Utility Regulatory Policies act of 1978 ("PURPA").[2] Currently, the Commission exempts eligible small hydroelectric power projects using natural water features without having any generic definition of a natural water feature.

The Commission is also amending § 4.33(a) (2) of its regulations to preclude the filing of a notice of intent to file a competing preliminary permit application for a natural water feature project. The final rule also provides, in § 4.33(a) (3), that if an exemption or license application is filed for a project of the type enumerated in § 4.33 (a) (2) [major project—existing dam, minor water power project, or natural water feature project], a notice of intent to file an exemption or license application will not be accepted from a person if that person has previously filed a notice of intent to file such an exemption or license application for the same project.

The final rule also clarifies the existing responsibility of an exemption applicant under § 4.107(e) (3) to docu-

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[1]These procedures were established in Final Rule, "Exemption from All or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects With An Installed Capacity of Five Megawatts or Less," issued November 7, 1980 [Docket No. RM80-65, Order No. 106], 45 FR 76115, November 18, 1980.

[2]16 U.S.C. 2705, 2708, as amended by section 408 of the Energy Security Act of 1980 ("ESA") (Pub. L. 96-294, 94 Stat. 611).

ment its pre-filing consultation with federal or state fish and wildlife agencies. The final rule does not icnlude any change to § 4.102(a) (2) (i) of the Commission's regulations as provided in the Notice of Proposed Rulemaking.[3]

II. Exemption of Natural Water Feature Projects

A. Energy Security Act of 1980

Congress, in section 408 of the Energy Security Act of 1980 ("ESA"), amended sections 405 and 408 of PURPA to authorize the Commission to exempt, from all or Part of Part I of the Federal Power Act including any licensing requirement, certain small hydroelectric power projects with proposed installed capacity of 5 MW or less. The PURPA amendments specifically empower the Commission to grant small hydroelectric project exemptions by rule or order "on a case-by-case basis or on the basis of classes or categories of projects."[4]

The statute also provides that such exemptions are subject to subsections 30(a), (c), and (d) of the Federal Power Act (16 U.S.C. 824(a), (c), (d)). These subsections provide for consultation between the Commission and state and federal fish and wildlife agencies and for the imposition of terms and conditions to prevent loss of, or damage to, fish and wildlife resources.

Most important for this final rule, section 408 of PURPA limits projects eligible for exemption to those utilizing or proposing to utilize the water power potential

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[3]46 FR 55536 (Nov. 10, 1981).

[4]Section 405(d), 16 U.S.C. 2705(d).

of either an existing dam or a "natural water feature" without the need for any dam or impoundment. The statute itself does not contain a definition for natural water feature. Similarly, the legislative history does not provide a specificity on the types of natural water feature projects that may be exempted. *See, e.g.,* S. Rep. No. 96-824, 96th Cong., 2d Sess. 276 (1980) (Conference Report).

B. Definition of a Natural Water Feature Project

When the Commission established procedures for case-specific exemptions in November 1980, it did not, at that time, define a natural water feature because the Commission did not have sufficient experience with natural water feature projects. Therefore, the Commission used a broad definition of "dam" in § 4.102 of the exemption rules, so as to include among the exemptible power generation projects those that rely upon existing dams or diversions that would not obstruct all or substantially all of the flow of a natural body of water. In light of the experience gained under Order No. 106 case-specific procedures on proposed natural . . .

• • •

(as continued at 47 Fed. Reg. 38512)

In consideration of the foregoing, the Commission amends Part 4 of the Chapter I, Title 18, Code of Federal Regulations, as set forth below, effective October 1, 1982.

By the Commission.

Kenneth F. Plumb,
Secretary.

PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATION OF PROJECT COSTS

1. In § 4.33, paragraph (a)(2) is revised and a new paragraph (a)(3) is added to read as follows:

§ 433 Filing and disposition of conflicting applications.

(a) • • •

(2) A notice of intent to file a competing application for preliminary permit may not be submitted for any proposed major project—existing dam, as defined in § 4.50 (b)(5) of this chapter, any minor water power project of 5 MW or less, as defined in § 4.60(b)(3) of this chapter, which utilizes an existing dam; or any water power project with an installed capacity of 5 MW or less which utilizes a natural water feature, as defined in § 4.102(1)(2). Any competing application for preliminary permit for a proposed major project—existing dam, minor water power project 5 MW or less which utilizes an existing dam, or water power project 5 MW or less which utilizes a natural water feature must be submitted not later than 30 days after the last date for filing protests and petitions to intervene prescribed in the public notice issued under § 4.31 (c)(2) of this chapter for the initial application.

(3) For any single or mutually exclusive project or project site of the type of project enumerated in paragraph (a)(2) of this section, an applicant may file not more than one notice of intent to file an exemption application and not more than one notice of intent to file a license application.

• • • • •

2. In § 4.102, paragraphs (a), (a)(1) and (a)(2) are revised to read as follows:

Subpart K—Exemption of Small Hydrolectric Power Projects of 5 Megawatts or Less

• • • • •

§ 4.102 Definitions.

For purposes of this subpart—

(a) "Dam" means any structure for impounding water which is usable for electric power generation, if the impoundment supplies all, or the substantial part of, the total hydroelectric pressure (head) developed for such generation.

(1) "Small hydroelectric power project" means any project in which capacity will be installed or increased after the date of application under this subpart, which will have a total installed capacity of not more than 5 megawatts, and which:

(2)(i) Would utilize for the generation of electricity a natural water feature, such as a natural lake, waterfall, or the gradient of a natural stream, without the need for a dam and man-made impoundment;

(ii) Would not retain water behind any structure for the purpose of a storage and release operation; and

(iii) Except as otherwise permitted under § 4.103 (d)(2), would contain a diversion or intake structure that:

(A) Is not higher than two times the diameter of the penstock or intake pipeline, not to exceed ten feet in total height, as measured from the lowest point of the

natural streambed at the downstream toe of the structure to the normal water surface level retained by the structure assuming a no-spill condition;

(B) Does not retain more than two acre-feet (2467 cubic meters) of water behind the diversion or intake structure;

APPENDIX C-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7139

TULALIP TRIBES OF WASHINGTON,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

No. 83-7140

UPPER SKAGIT INDIAN TRIBE, et al.,

Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

No. 83-7149

NATIONAL WILDLIFE FOUNDATION, et al.,

Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ORDER

(Filed December 6, 1984)

Before: WRIGHT and HUG, Circuit Judges and EAST,* District Judge

Petitioners' applications for attorney fees under the Equal Access to Justice Act and their motion for recon-

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* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

sideration of the Clerk's order denying costs are denied. Although petitioners raised a number of substantive issues in this case, it was brought under section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, and the assessment of costs against respondent is barred by 16 U.S.C. § 825p. We see no evidence of congressional intent to permit the award of attorney fees under the Equal Access to Justice Act when the assessment of costs is expressly barred by statute, and we therefore deny the applications for attorney fees on that ground.

APPENDIX C-2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7139

TULALIP TRIBES OF WASHINGTON,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

No. 83-7140

UPPER SKAGIT INDIAN TRIBE, SWINOMISH TRIBAL COMMUNITY, SAUK-SUIATTLE INDIAN TRIBE, SKAGIT SYSTEM COOPERATIVE, and POINT NO POINT TREATY COUNCIL,

Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

No. 83-7149

NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION, MONTANA WILDLIFE FEDERATION, FRIENDS OF THE RIVER, and TROUT UNLIMITED, INC.,

Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ORDER

(Filed February 15, 1985)

Before: WRIGHT and HUG, Circuit Judges, and EAST, Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing on application for attorney fees and the petition for rehearing on motion to direct compliance. Judge Hug has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
SEP 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1805

In the Supreme Court of the United States

OCTOBER TERM, 1985

TULALIP TRIBES OF WASHINGTON, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Access to Justice Act, 28 U.S.C. 2412, which under certain circumstances provides for the award of attorneys' fees "in addition to any costs," authorizes the assessment of attorneys' fees against the Federal Energy Regulatory Commission in a case arising under the Federal Power Act, 16 U.S.C. 791 *et seq.*, which specifically prohibits the award of costs against the Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1805

TULALIP TRIBES OF WASHINGTON, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 749 F.2d 1367. A prior opinion of the court of appeals (Pet. App. 6-14) is reported at 732 F.2d 1451.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1984, and a petition for rehearing was denied on February 15, 1985 (Pet. App. 42-43). The petition for a writ of certiorari was filed on May 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of petitioners' successful challenge to a Federal Energy Regulatory Commission rule on hydroelectric projects involving "natural water features." Section 408 of the Energy Security Act of 1980, 16 U.S.C.

2708, authorizes the Commission to exempt from the otherwise applicable licensing requirements of the Federal Power Act, 16 U.S.C. 791a *et seq.*, projects using natural water features "without the need for any dam or impoundment" (16 U.S.C. 2708(b)). The Commission issued implementing regulations (18 C.F.R. 4.102(a)) permitting projects utilizing diversion structures up to ten feet in height to qualify for such exemptions. On petition for review, the court of appeals invalidated the Commission's regulations on the grounds that they were inconsistent with the plain meaning of the statutory word "dam" and were not supported by the "scanty and inconclusive" legislative history (Pet. App. 6-14).

2. Following the court of appeals' decision on the merits, petitioners moved for an award of costs and attorneys' fees against the Commission. Petitioners relied on the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, which, inter alia, allows a prevailing party to collect costs against the government, except as otherwise specifically provided by statute (28 U.S.C. 2412(a)). "[I]n addition to any costs awarded pursuant to subsection (a)," subsection (d) of the EAJA authorizes a prevailing party to collect attorneys' fees against the government unless the court finds that the government's position was "substantially justified" or that special circumstances would make an award unjust (28 U.S.C. 2412(d)(1)(A)). Similarly, subsection (b) of the EAJA authorizes a court to assess attorneys' fees against the government, "in addition to the costs which may be awarded pursuant to subsection (a)," whenever and "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award [of attorneys' fees]" (28 U.S.C. 2412(b)). Petitioners contended that they were entitled to both costs and attorneys' fees because they were the prevailing parties, the Commission could not show that

its position had been substantially justified within the meaning of subsection (d), and the Commission had litigated this case in bad faith such that an award under the common law, as incorporated by subsection (b) of the EAJA, was appropriate. (Petitioners did not cite subsection (b) in their initial application for fees; they first mentioned it in their reply brief in the court of appeals.)

The Commission opposed petitioners' request for costs and fees, arguing that the Commission is not subject to the EAJA's general provision for cost awards (28 U.S.C. 2412(a)), because Section 317 of the Federal Power Act, 16 U.S.C. 825p, explicitly prohibits the recovery of costs from the agency. The Commission also argued that the EAJA did not authorize an award of attorneys' fees, because the Act refers to attorneys' fee awards only "*in addition to*" any costs awarded pursuant to subsection (a), and the Commission is not liable for such costs.

The court of appeals agreed with the Commission (Pet. App. 1-5). The court reasoned that the Federal Power Act specifically provides that "[n]o costs shall be awarded against the Commission in any judicial proceeding under this chapter" (16 U.S.C. 825p); that because petitioners had invoked the jurisdiction of the court of appeals under Section 313 of the Federal Power Act, 16 U.S.C. 825*l*, the proceeding had arisen "under this chapter," *i.e.*, the Federal Power Act; and that petitioners therefore were not entitled to costs (Pet. App. 3).

Relying on its holding as to costs, the court of appeals agreed with the Commission on the attorneys' fee claim as well (Pet. App. 3). Concluding that the "in addition to" language of subsection (d) of the EAJA was "critical" (*ibid.*), the court held that when an award of costs is not allowable under 28 U.S.C. 2412(a), attorneys' fee awards under 28 U.S.C. 2412(d)(1)(A) are likewise precluded. In the court's view, the EAJA "did not expressly create a right

to fees if [as here] the award of costs was barred" (Pet. App. 5).[1]

ARGUMENT

The court of appeals' opinion represents a reasoned analysis of the EAJA as that Act existed at the time of the decision below and does not conflict with any decision of this Court. Although there is a conflict in the circuits on the issue presented by petitioners,[2] that conflict does not warrant review by this Court. The original legislation that spawned the conflict expired on October 1, 1984, and Congress has passed new legislation that will resolve the conflict for the future. In addition, review of the issue raised by petitioners would not necessarily result in a judgment in their favor. In light of its conclusion that the Commission is not subject to attorneys' fee assessments under the EAJA, the court of appeals had no occasion to decide whether the

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[1]The court of appeals did not discuss petitioners' claim for fees under subsection (b) of the EAJA, perhaps because petitioners did not raise it until the filing of their reply brief. Because that subsection contains the same "in addition to" language that the court found dispositive with respect to subsection (d), however, the court may have been of the view that petitioners' claim for fees under subsection (b) was barred for the same reason as was their claim under subsection (d). See also note 13, *infra*.

[2]The District of Columbia Circuit has ruled that attorneys' fees may be awarded against the Commission under the EAJA despite its agreement with the court of appeals in this case that the Act does not permit the assessment of costs against the agency. *Hirschey* v. *FERC*, 760 F.2d 305 (D.C. Cir. 1985). See also *Washington Urban League* v. *FERC*, 743 F.2d 166, 167 n.1 (3d Cir. 1984).

Petitioners also assert (Pet. 6-7) that the decision below conflicts with decisions of the Fifth and Eighth Circuits in two condemnation cases. *United States* v. *341.5 Acres of Land*, 751 F.2d 924, 935 (8th Cir. 1984); *United States* v. *329.73 Acres*, 704 F.2d 800, 808 (5th Cir. 1983) (en banc). However, the court below correctly distinguished those cases from the instant one on the ground that condemnation cases were explicitly mentioned in the EAJA's legislative history. See Pet. App. 5; cf. note 5, *infra*.

Commission's position was substantially justified. Absent a determination that it was not, petitioners would not be entitled to attorneys' fees in any event.

1. The pertinent language of subsection (d) of the EAJA, 28 U.S.C. 2412(d), authorizes attorneys' fee awards only "in addition to any costs awarded pursuant to subsection (a)." [3] The pertinent language of subsection (b) of the Act is virtually identical.[4] The ordinary and natural reading of this statutory language [5] is that "[Congress] condition[ed] the

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[3]Subsection (d) of the EAJA, 28 U.S.C. 2412(d), provides in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

[4]Subsection (b) of the EAJA, 28 U.S.C. 2412(b), provides:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

[5]This Court has emphasized that "deference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally require [courts] to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' " *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 10 (quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962)). Courts may depart from the "plain meaning" of the statutory language only in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters * * *." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

award of fees and expenses upon the award of costs." *Hirschey* v. *FERC*, 760 F.2d 305, 311 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part). The court of appeals therefore correctly concluded that, because the Commission is not required to pay costs by virtue of Section 317 of the Federal Power Act, 16 U.S.C. 825p (a proposition not disputed by petitioners in this Court), the Commission likewise had no fee liability under the EAJA.

The approach adopted by the court of appeals is, moreover, consistent with the overall structure of the EAJA. As the court below pointed out (Pet. App. 5), the EAJA expanded the previous statutory authorization for the assessment of costs against the government to encompass, in certain circumstances, attorneys' fees as well. But the Commission's organic statute has always exempted it from the payment of costs (16 U.S.C. 825p), and thus any requirement that it pay attorneys' fees under the EAJA would create an anomaly inconsistent with Congress's parallel treatment of costs and attorneys' fees. Such a requirement also would be at odds with the settled rule that waivers of sovereign immunity must be unequivocally expressed. See, *e.g.*, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983). In short, petitioners have failed to show that the decision below is "demonstrably at odds" with congressional intent. See note 5, *supra*.

2. In any event, the issue in this case is of no continuing importance. As originally enacted in 1980, portions of the EAJA contained a "sunset" provision (see 28 U.S.C. 2412 note), and, pursuant to that provision, subsection (d) expired on October 1, 1984. After a hiatus of nearly one year, the sunset provision was repealed, and subsection (d) was made permanent. Pub. L. No. 99-80, 99 Stat. 186. The critical "in addition to" language of subsection (d) was not amended by the 1985 legislation, but the legislative history of the new Act endorses petitioners' reading of the statute

for the future. The House Report on the 1985 legislation provides as follows (H.R. Rep. 99-120, 99th Cong., 1st Sess. 17 (1985) (citations omitted)):

> The language of section 2412(d)(1)(A) expresses the view that prevailing parties shall be awarded attorney's fees and, when available, costs as well. This approach ratifies the approach taken by four circuits. * * * Thus, the Committee rejects the interpretations of the statute by the 9th Circuit [in the instant case]. [6]

Although the Commission is of the view, for the reasons already stated (see pages 5-6, *supra*), that the court of appeals correctly interpreted the statutory language of subsection (d), which, as noted, was not altered in the 1985 legislation, the Commission henceforth will adhere to the expression of congressional intent set forth in H.R. Rep. 99-120, *supra*.[7] Accordingly, the issue presented by this case will not arise in future cases.

At the same time, however, it is clear from the new Act's effective date provisions that Congress intended the instant case to be resolved under the original Act.[8] Section 7

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[6]The Senate did not issue a separate report, and it passed the House bill without change. See 131 Cong. Rec. S9991 *et seq.* (daily ed. July 24, 1985).

[7]Subsection (b) of the EAJA, 28 U.S.C. 2412(b), was never subject to the original sunset provision, and thus it never expired. Nevertheless, it is only logical to give the same meaning to the "in addition to" language that appears in both subsections.

[8]Because the 1985 legislation did not amend the statutory language at issue, the new Act's effective date provisions may be technically irrelevant to the disposition of this case. The real issue is the significance of the post-enactment legislative history contained in H.R. Rep. 99-120, *supra*. See page 11 and notes 10-11, *infra*. Nevertheless, the new Act's effective date provisions provide clear legislative direction for determining the applicability of the 1985 legislation to particular categories of cases. By analogy, that structure offers implicit guidance on the effect of the new Act's legislative history for the same categories of cases.

of Pub. L. No. 99-80, 99 Stat. 186, provides in pertinent part:

> (a) *In General*—Except as otherwise provided in this section, the amendments made by this Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act.
>
> (b) *Applicability of Amendments to Certain Prior Cases*—The amendments made by this Act shall apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this Act, except that in any such case, the 30-day period referred to in * * * section 2412(d)(1)(B) of title 28, United States Code * * *, shall be deemed to commence on the date of the enactment of this Act.

Inasmuch as this case was commenced *prior* to October 1, 1984, the triggering date referred to in subsection (b) above, the controlling provision is subsection (a), which makes the new EAJA applicable to cases "pending" on the date of enactment. But the legislative history of the new EAJA makes clear that a case is not "pending" for purposes of subsection (a) when the only matter pending is a request for attorneys' fees. This point was made explicit by Representative Kastenmeier, the chief sponsor and floor manager of H.R. 2378, the bill that became the new Act, and Chairman of the Subcommittee on Courts and Civil Liberties and Administration of Justice of the House Judiciary Committee, the subcommittee responsible for H.R. 2378 (131 Cong. Rec. H4762 (daily ed. June 24, 1985) (emphasis added)):

> *Cases which were pending on October 1, 1984, including fee application proceedings would be governed by the original act, provided that the time to file the fee application expired before the date of enactment of this bill.* This bill would apply to any case pending on October 1, 1984, and finally disposed of before the date

> of enactment of this bill, if the time for filing an application for fees and other expenses had not expired as of such date of enactment.

As these remarks make plain, the original EAJA applies to all cases pending on October 1, 1984, provided that the time for filing the fee petition had expired prior to the date of enactment of the new EAJA. As a practical matter, Representative Kastenmeier's explanation of the effective date provisions means that the original EAJA applies to any case in which the only matter pending on the date of enactment was a fee petition, because only in those cases would the time for filing a fee petition have expired prior to the date of enactment.

Other legislative history confirms Representative Kastenmeier's explanation of the effective date provisions. The House Report, for example, expressly contemplates application of the original EAJA to "pending" cases, stating that "[t]o the extent that amendments made by this Act merely clarify the original Congressional intent in EAJA these amendments will have the effect of informing judicial construction of pre-1985 provisions of EAJA *with respect to pending cases*." H.R. Rep. 99-120, *supra,* at 21 (emphasis added). Plainly, this statement is rendered superfluous if "pending" as used in Section 7(a) is construed to encompass *all* cases "pending" on the date of enactment. Such a construction would mean that there would be no case to which the "pre-1985 provisions of EAJA" could apply.

Under the effective date provisions of the new EAJA, as explained by Representative Kastenmeier, there can be no dispute that the original EAJA controls the disposition of this case. This case was a "fee application proceeding" that was "pending on October 1, 1984" (131 Cong. Rec. H4762 (daily ed. June 24, 1985) (remarks of Rep. Kastenmeier)). Under the original EAJA, the time for filing a fee application in this case expired 30 days after the court of appeals'

May 10, 1984 decision on the merits, or June 9, 1984.[9] Thus, "the time to file a fee application expired before the date [August 5, 1985] of enactment of [H.R. 2378]" (131 Cong. Rec. H4762 (daily ed. June 24, 1985) (remarks of Rep. Kastenmeier)), and this case is "governed by the original act" (*ibid.*).

This result is in accord with the principles outlined by the Court in *Bradley* v. *School Board,* 416 U.S. 696, 711 (1974) (emphasis added), in which the Court explained that "a court is to apply the law in effect at the time it renders its decision, *unless * * * there is statutory direction or legislative history to the contrary.*" The legislative history cited above falls squarely within the *Bradley* exception. See *Bradley,* 416 U.S. at 715-716 n.21; cf. *Bennett* v. *New Jersey,* No. 83-2064 (Mar. 19, 1985), slip op. 5-8. Moreover, Representative Kastenmeier's explanation of the effective date provisions is in accord with the interpretation given by several courts to the effective date provision of the original EAJA, which had made the Act applicable to "any civil action or adversary adjudication * * * which is pending on, or commenced on or after [October 1, 1981]." 5 U.S.C. 504 note. Applying this provision, a number of courts have held that the original EAJA did not apply to those cases in which the only matter "pending" on October 1, 1981, was an application for attorneys' fees. See, *e.g., Nichols* v. *Pierce,* 740 F.2d 1249, 1255-1259 (D.C. Cir. 1984); *Commissioners of Highways* v. *United States,* 684 F.2d 443, 444-445 (7th

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[9]Section 2 of Pub. L. No. 99-80, 99 Stat. 185 (to be codified at 28 U.S.C. 2412(d)(2)(G)), amended the EAJA by defining "final judgment," from which the 30-day period for filing a fee application begins to run, as "a judgment that is final and not appealable." Assuming, arguendo, that this amendment applies to the instant case, the time for filing petitioners' fee application would have expired 30 days after the last date on which the Commission could have filed a petition for a writ of certiorari, or September 7, 1984. However the 30-day filing period is calculated, therefore, this case is governed by the original Act.

Cir. 1982); *Tabcor Sales Clearing, Inc.* v. *United States,* 596 F. Supp. 402, 404 (N.D. Ill. 1984); but cf. *Knights of the Ku Klux Klan* v. *East Baton Rouge,* 679 F.2d 64, 68 (5th Cir. 1982); *United States ex rel. Heydt* v. *Citizens State Bank,* 668 F.2d 444 (8th Cir. 1982).

This case is therefore governed by the original Act, and it would thus be inappropriate to remand the matter for the court of appeals to consider the case under the new Act. This is particularly so in light of the fact (see page 6 and note 8, *supra*) that the pertinent statutory language was not altered in the 1985 amendments.[10] Although the Court occasionally remands cases for reconsideration in light of new legislation (see, *e.g., East Baton Rouge Parish School Bd.* v. *Knights of the Ku Klux Klan,* 454 U.S. 1075 (1981)), it does not follow that course of action when the only question to be determined is the weight to be accorded the post-enactment legislative history of a statutory provision that has not been amended.[11]

Moreover, such a course would be especially unwarranted here, because the instant case is the only case clearly affected by the decision below. Contrary to petitioners'

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[10]Accordingly, the statement in the House Report that, "[t]o the extent that amendments made by this Act merely clarify the original Congressional intent in EAJA these amendments will have the effect of informing judicial construction of pre-1985 provisions of EAJA with respect to pending cases" (H.R. Rep. 99-120, *supra,* at 21), is inapplicable to this case. Because the 1985 Act did not alter the pertinent language of subsections (b) and (d), there is no applicable amendment to "inform[ ] judicial construction" of this pending case.

[11]Undoubtedly, this is because "[a] mere statement in a conference report * * * as to what the Committee believes an earlier statute means is obviously less weighty" than subsequent legislation declaring the intent of an earlier statute. *CPSC* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 118 n.13 (1980). Compare *Heckler* v. *Turner,* No. 83-1097 (Feb. 27, 1985), slip op. 25 ("[T]he 98th Congress reiterated its immediate predecessor's intentions not just by words but by deed"); see generally *id.* at 23-26.

allegations of widespread impact, nearly all of the cases cited by petitioners (Pet. 13-14) as potentially being affected by the decision in this case have yet to be decided on the merits. Petitioners' concern with those cases is therefore premature. Should the Commission win the cases on the merits, attorneys' fees would not be awardable in any event. And if the petitioners prevail in those cases, any fee applications that may be filed will of course post-date the new legislation. For such cases, the Commission will, as noted, follow the intent expressed in H.R. Rep. 99-120, *supra,* with respect to the issue presented by this case. Because of the extremely limited impact of the decision below, therefore, review by this Court is unnecessary, as is a remand to the court of appeals to consider the post-enactment legislative history of the provision at issue.[12]

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[12]Only one case cited by petitioners (Pet. 13-14) is in a posture comparable to the instant one. In *Confederated Tribes & Bands of the Yakima Indian Nation* v. *FERC,* 746 F.2d 466 (9th Cir. 1984), cert. denied *sub nom. Public Utility Dist. No. 1* v. *Confederated Tribes & Bands of the Yakima Indian Nation,* No. 84-1365 (May 20, 1985), the court of appeals denied the fee application (which sought less than $6,000) on the basis of the decision below. Nevertheless, the court's opinion on the merits suggests that it also was of the view that the Commission's position was substantially justified, thus rendering a fee award inappropriate in any event. See, *e.g.,* 746 F.2d at 475 ("Viewed narrowly, [the Commission's position] comports with the cases [it] cited."). In any event, the request of the petitioners in that case that the court of appeals rehear their motion for attorneys' fees remains under submission.

We note also that one potentially similar case has arisen subsequent to the filing of the petition in this case. In *Steamboaters* v. *FERC,* 759 F.2d 1382 (9th Cir. 1985), reh'g pending, the court sustained the Commission's orders in all respects save one; as to that issue, the court remanded the case for a further explanation of the Commission's conclusion that a hydroelectric project would not harm the environment and did not require the preparation of an environmental impact statement. It seems doubtful that the petitioners in that case qualify as prevailing parties in these circumstances, but, in any event, their request for attorneys' fees has not yet been acted upon by the court of appeals.

3. Finally, there is nothing to indicate that review by this Court would alter the judgment in this case. Because of the manner in which the court of appeals disposed of the case, it had no occasion to consider the Commission's alternative argument that a fee award would be inappropriate in any event because the agency's position was "substantially justified." Absent a contrary finding by the court of appeals, petitioners are not entitled to any attorneys' fees. In this regard, it is important to note that the mere fact that the government loses a case does not create a presumption that its position lacked "substantial justification." S. Rep. 96-253, 96th Cong., 1st Sess. 7 (1979); H.R. Rep. 96-1418, 96th Cong., 2d Sess. 11 (1980). Indeed, the government need not even demonstrate that "its decision to litigate was based on a substantial probability of prevailing." S. Rep. 96-253, *supra,* at 7; H.R. Rep. 96-1418, *supra,* at 11. See also 131 Cong. Rec. H4763 (daily ed. June 24, 1985) (remarks of Rep. Kastenmeier) ("Proving [substantial justification] is not intended to be so difficult that the Government may only avoid fees by prevailing in the litigation.").

Applying this standard to the instant case, it seems extremely unlikely that the Commission's position would be held to lack substantial justification. The agency was defending a duly promulgated Commission regulation, issued after notice and comment rulemaking. Although the court of appeals disagreed with the Commission's interpretation of the Energy Security Act, it acknowledged that the legislative history was "scanty and inconclusive" (Pet. App. 11). Moreover, the court did not reject the Commission's argument that its interpretation of the statute was consistent with congressional intent as expressed in the conference report (*id.* at 12). In these circumstances, the Commission, even though unsuccessful on the merits, can hardly be

faulted for defending the agency's rule in court.[13] Accordingly, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1985

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[13]As earlier noted, the court of appeals never even mentioned petitioners' claim for fees under the bad faith rationale incorporated in subsection (b) of the EAJA. However, there is absolutely nothing in either opinion of the court of appeals to support petitioners' contention that the Commission litigated this case in bad faith.

DOJ-1985-09

Supreme Court, U.S.
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CLERK

No. 84-1805

In The

Supreme Court of the United States

October Term, 1985

THE TULALIP TRIBES OF WASHINGTON, UPPER SKAGIT INDIAN TRIBE, SWINOMISH TRIBAL COMMUNITY SAUK-SUIATTLE INDIAN TRIBE, SKAGIT SYSTEM COOPERATIVE POINT NO POINT TREATY COUNCIL, NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION, MONTANA WILDLIFE FEDERATION, FRIENDS OF THE RIVER, and TROUT UNLIMITED, INC.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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A listing of all parent companies, subsidiaries, and affiliates of the corporate petitioners is at Petition for Writ of Certiorari, ii.

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ARGUMENT

1. The Respondent's Change in Legal Position Calls for a Summary Reversal or Remand.

As a result of legislative developments subsequent to the filing of the certiorari petition, the respondent has changed its position regarding the meaning of the attorney fee provisions at issue. On August 5, 1985, President Reagan signed Public Law 99-80, the reauthorization of the Equal Access to Justice Act. As respondent points out, the 1985 legislation left unchanged the "critical 'in addition to' language;" and the 1985 legislative history "endorses petitioners' reading of the statute." Brief in Opposition (Br.Opp. 6-7). The Federal Energy Regulatory Commission "henceforth will adhere to the expression of congressional intent set forth in H.R. Rep. 99-120." (Br.Opp. 7). In other words, the Commission will no longer dispute that the Congressional intent in 28 USC 2412(b) and (d) is to allow an award of attorney fees, even though a cost award is precluded by another statute.

There is plain error in the court of appeals' opinion. That error is essentially conceded by the Solicitor General. Although the Commission contends that the Ninth Circuit opinion represents "a reasoned analysis" of the EAJA before the 1985 legislative developments, it is sufficiently persuaded by the subsequent legislative history to alter its interpretation of the controlling statutory language. Petitioners assume that the Commission has not announced its new interpretation simply because it wishes to deflate the importance of this case, but that it reversed its legal position only after careful legal analysis.

This Court has often granted certiorari and reversed summarily where the respondent confesses error. *See, e.g. Urrutia v. United States,* 357 U.S. 577 (1958); Stern and

Gressman, *Supreme Court Practice* (1978 ed.), p. 367. It should do so in this case, as well. In the alternative, petitioners suggest that the Commission's change in legal position and the new legislative developments call for vacating the ruling below and remanding for reconsideration. *See, e.g., Weinberger, et. al. v. Arellano, et. al.*, 86 L.Ed.2d 255 (1985); *Knights of K.K.K. v. East Baton Rouge Parish School Board*, 454 U.S. 1075 (1982). *See also, Supreme Court Practice, supra* at 368.

2. The Correct Interpretation of the 1980 Act Should Be Enforced in This Case.

A. Section 7 Does Not Bar Application of the Subsequent Legislative History.

The respondent makes several arguments for the Court to limit enforcement of the correct interpretation of 28 U.S.C. §§ 2412(b) and (d) to future cases. None of the arguments for future enforcement are persuasive. They hinge upon framing the issue as essentially a question of retroactive application of the 1985 amendments. However, petitioners' claim is based on the 1980 EAJA. The 1985 Act and its legislative history have become important only because they confirm the petitioners' interpretation of the 1980 Act, and because Congress found it unnecessary to amend the controlling language in order to accomplish the original intent.

Section 7 of Pub. L. No. 99-80, 99 Stat. 186, which addresses the effective date of the 1985 "amendments" is clearly inapplicable to the proper interpretation of the attorney fee language at issue, since that language has not been amended.[2] Respondent acknowledges the irrele-

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[2] Since petitioners do not rely on any 1985 amendments in this appeal, there is no need for the Court to decide whether this case was "pending" as that term was used in section 7.

vancy of Section 7, in note 8 of its brief, but then proceeds with a convoluted and tortuous argument as to why Section 7 should govern the effect of the 1985 *legislative history*, under the principles of *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

Bradley deals with the effect of a new *statutory provision* authorizing attorney fees, on an attorney fee appeal. *Id.* at 710. The Court found petitioner entitled to fees, under the new provision, following the general rule that a new law should be applied absent a "statutory direction or legislative history to the contrary." *Id.* at 711.[3] The 1985 EAJA does not direct that unamended language from the 1980 EAJA should have only prospective effect.

B. Congress Intended That Its Clarification of the Original Intent Be Applied to Unresolved Fee Proceedings Filed Under the 1980 Act.

The 1985 legislative history states that clarifications of the original intent in the 1980 EAJA should be applied by the courts in cases such as this. As respondent points out, technical amendments which merely clarified the original Congressional intent, were to "have the effect of informing judicial construction of pre-1985 provisions with respect to pending cases." (Br.Opp. 9 quoting from H. R. Rep. 99-120). Respondent notes that this case would be one such "pending" case, as that term was used in the legislative history. However, respondent does not explain why Congress would have intended that courts apply its technical amendments clarifying the original intent to

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[3] Even when the law has been changed, there is no injustice in applying the new law to fee proceedings on appeal where, as here, the dispute is with the government, which has far greater litigation resources, the petitioner has rendered a substantial nationwide benefit by compelling compliance with federal law, and the agency had reason to believe it might be held liable for fees if it continued in its illegal course of action. *Bradley v. Richmond School Board*, 416 U.S. at 718-721.

pending cases such as this one, but not apply an explicit rejection of the Ninth Circuit interpretation to the same extent.

The purpose of Section 7 was

> . . . to ensure that no party is denied the protection of the act solely because of the failure of the President to approve the bill last year. It is our intent that the protection afforded by the Equal Access to Justice Act be deemed continuous from the date of its first enactment.

131 Cong. Rec. S9998 (daily ed. July 24, 1985). The 1985 EAJA was to "make permanent those provisions of the law which were originally enacted as a three-year experiment." H. R. Rep. 99-120, 99th Cong., 1st Sess. 5 (1985). To apply section 7 so as to foreclose petitioner's attorney fee claim in spite of the original intent of the 1980 act would undermine its purpose of providing continuous protection.[4] Congress certainly did not intend Section 7 to be used to cut off a fee award which it considered available under the 1980 EAJA. As Senator Domenici pointed out,

> Equal access to justice made the promise of justice to these people who had gone to great expense to challenge agency wrong, or who had successfully defended themselves against wrongful agency action.

131 Cong. Rec., *supra,* at S9998. Congress did not intend Section 7 to be used as a means of breaching that promise. It was anticipated that judicial reconsideration in light of the clarifications of the 1980 EAJA, or the 1985 amendments, would only be denied when a fee petition had been fully adjudicated "with no further appeal pending on the

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[4] As noted by respondent, subsection (b) of the EAJA, 28 USC 2412(b), which allows for fees based on bad faith or other common law grounds, never expired, since it was not subject to the original sunset provision. Respondent's Section 7 argument treats even this unexpired provision of the EAJA as a new 1985 amendment.

date of enactment." *See,* 131 Cong. Rec. H4762 (daily ed. June 24, 1985) (remarks of Rep. Kastemeier).

This case is more analogous to *Bell v. New Jersey,* 416 U.S. 773 (1983), than to *Bradley.* In *Bell,* the Court found it unnecessary to decide the retroactivity of the 1978 amendments to the Elementary and Secondary Education Act, in ruling that states were liable for misapplied federal funds. Although the 1978 version of the Act had made the liability explicit, the Court relied on the "persuasive" effect of the subsequent legislative history regarding the earlier Act's original intent, to find that the states were already liable under the prior law. *Id.* at 780-781, 784.

C. Congress Considered the Ninth Circuit's Decision to be Contrary to the Plain Meaning of the 1980 EAJA.

The fact that Congress found it unnecessary to amend the relevant language of 28 USC § 2412(b) and (d) underscores that Congress considered the original statutory language sufficiently clear. The Ninth Circuit's opinion was considered plainly incorrect and of insufficient merit to justify any statutory amendment. The House Report notes:

> Subsections 2(a) (1) and 2(a) (2) make technical changes to improve the Act and to clarify the original Congressional intent.
>
> The language of section 2412(d) (1)(A) expresses the view that prevailing parties shall be awarded attorney's fees and, when available, costs as well. This interpretation ratifies the approach taken by four circuits. *See, Hirschey v. Federal Energy Regulatory Commission,* No. 82-2170, at slip op. 5-8 (D.C. Cir., April 19, 1985); *United States v. 341.45 Acres of Land, St. Louis County, Minnesota,* 751 F.2d 924, 934 (8th Cir. 1984); *Washington Urban League v. Federal Energy Regulatory Commission,* 743 F.2d 166, 167, n.1 (3rd Cir. 1984); *United States v. 329.73 Acres, Grenada*

> *and Yalobusha Counties;* 704 F.2d 800, 808 (5th Cir. 1983). Thus, the Committee rejects the interpretations of the statute by the 9th Circuit. *See, Tulalip Tribes of Washington v. Federal Energy Regulatory Commission,* 749 F.2d 1367 (9th Cir. 1984).

H.R. Rep. 99-120, *supra* at 17.

The Ninth Circuit interpretation is inconsistent with the plain meaning of the word "any," which by definition incorporates the possibility of none. *Hirschey v. F.E.R.C.*, 760 F. 2d 305, 308 (DC Cir. 1985). In *Hirschey,* the appeals court described the Commision's fee/cost linkage argument to be "based on patently flawed premises and a wholly untenable reading of EAJA." *Id.* The Third Circuit Court of Appeals had said that the Commission's linkage argument did not even merit discussion. *Washington Urban League v. F.E.R.C.*, 743 F. 2d 166, 167 n.1 (3rd Cir. 1984).

As in *Bell v. New Jersey,* any requirement that Congress act "unambiguously" in imposing a liability was satisfied, because "the plain language of the statute" was sufficiently clear." 461 U.S. at 790, n.17.

D. The 1985 Legislative History is Entitled to Great Weight.

Even without the clear expression of Congressional intent that courts rely on this post enactment legislative history in construing the 1980 EAJA, the legislative history on the original intent would be entitled to "great weight," as a matter of common law. *See, Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 380-381 (1969); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 275 (1974). As in *Heckler v. Turner,* Congress acted on its historical interpretation. No. 83-1097, 53 LW 4211, 4219 (Feb. 27, 1985) (intended clarification of current law entitled to "considerable retrospective weight"). *See, also, Bell v. New Jersey, supra,* at 784; *Seatrain Ship Building Corp. v.*

Shell Oil Co., 444 U.S. 572, 596 (1980). Congress reenacted the critical statutory language without change and ratified the interpretation in four other circuits. The 1985 legislative history has particular weight because many of the House Judiciary Committee members considering the 1985 EAJA had been actively involved in fashioning the 1980 act.[5] *See, C. Sands Sutherland, Stat. Const.* § 49.11 (4th ed. 1973).

3. The Ninth Circuit Suggested That Fees Would Have Been Awarded If Not for the Conclusion That Costs Must Be Available.

The Commission's speculations about whether fees would have been awarded in this case in the absence of the court of appeals' misinterpretation are inappropriate, and not supported by the record. It is likely the court would have found a lack of substantial justification. Read in its context, the circuit court's reference to "scanty and inconclusive" legislative history does not suggest the Commission's position was reasonable. It suggests the contrary. The point was not that there was ambiguity in the legislation prohibiting an exemption for a new "dam," but that the Commission had had no sufficient legal basis upon which to ignore the plain meaning of the word "dam" in the statute. (Pet. App. 11-12). *See, Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). On appeal, the Commission conceded that the plain meaning of the word did not support to its statutory interpretation. The court

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[5] Representative Kastenmeier, who as respondent points out (Br.Opp. 8) was chief sponsor and floor manager of H.R. 2378, which became the new Act, was Chairman of the same House Judiciary Subcommittee during its review of both the 1980 and 1985 acts. Seventeen of the members of the House Judiciary Committee in 1980 were still members when the Committee reported on the 1985 EAJA. Brownson, Congressional Staff Directories for 1980 and 1985.

of appeals took a rather dim view of the Commission's primary argument on the scope of its exemption authority, which was based on legislative history and engineering. The Court said:

> . . . There is nothing in the legislative history or language of § 2708(b) . . . which even hints at this distinction between the purpose of the structure and its effect.

(Pet. App. 12).

It is highly unlikely that the court would have expressed its "sympathy" with the petitioners "plight," if the Court believed petitioners would have been unable to recover fees regardless of the availability of costs.(Pet. App. 5).

4. A Grant of Certiorari is Appropriate.

Since there is plain error in the court of appeals' opinion, a switch in the Commission's legal position, and a Congressional intent that courts apply the 1985 clarifications of original intent to all pending cases, the Court need be less concerned with the importance of accepting review for other cases. The special circumstances of this case justify summary disposition. Granting petitioners relief need not affect the court's docket control.

This case is not limited to the interests of a single individual. The rights of six separate Indian tribes and tribal organizations, and five conservation groups, each representing numerous individuals, are at issue. Certiorari has importance beyond addressing their plight. Respondent acknowledges that at least two other cases are pending in the Ninth Circuit Court of Appeals which present a similar issue. As in this case, the Commission's speculations about the ability to prove a lack of substantial justification are not warranted, particularly in light of the

1985 legislative history on the original intent of the substantial justification test.[6] Moreover, the Commission does not mention the possibility of other cases involving other agencies, which may also turn on the effect of the 1985 legislative history in construing the 1980 EAJA.

The fact that petitioners have alleged bad faith by the Commission makes it particularly important that they have the opportunity to prove their claim, and thereby deter any such misconduct. Petitioners alleged bad faith not only in their circuit court reply brief, but also in their Joint Memorandum in Support of Motion of Attorney Fees. In their opening brief, they alleged that they had been forced to submit a substantial amount of supplemental material because of highly misleading responses by the Commission during oral argument. They relied on the Ninth Circuit holding in *McQuiston v. Marsh, supra,* which discusses bad faith as an alternative basis for fees under the EAJA. In their Reply Brief, they cited problems in obtaining compliance with the Ninth Circuit's ruling on the merits, as additional evidence of bad faith. They argued that the Commission's legal position on the merits had no basis in either the statute or legislative history and that the Commission had asserted facts in justification of its natural water feature rule, which proved to be no more than a smoke screen. They also brought to the Court's attention a Congressional investigation of public com-

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[6] The House Judiciary Committee reiterated that the government has a substantial burden of showing that an action was substantially justified. The Committee said "the test must be more than mere reasonableness." H.R. Rep. 99-120 at 9. The 1980 EAJA had been construed to require the government to show more than mere reasonableness in its position. *See, Environmental Defense Fund v. Watt,* 722 F. 2d 1081, 1085 n.5 (2nd Cir. 1983); *Spencer v. NLRB,* 712 F. 2d 539, 558 (D.C. Cir. 1983).

plaints that the Commission has been repeatedly ignoring limitations on its authority over small hydroelectric development, in order to promote private over public interests. (Pet. at 11-13).

Certiorari and a summary reversal or remand should be granted.

DATED this 26th day of September, 1985.

Respectfully submitted,

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